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**Windward Roofing and Construction Co., Inc. and
Illinois District Council No. 1 of the International
Union of Bricklayers and Allied Craftworkers, AFL-CIO.** Case 13-CA-38606

August 2, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS WALSH
AND MEISBURG

On February 5, 2004, Administrative Law Judge Michael A. Marcionese issued the attached supplemental decision. The General Counsel and Charging Party Union filed exceptions and supporting briefs and the Respondent filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

Background

This case raises issues stemming from a settlement agreement executed by the Respondent, Charging Party Union, and General Counsel specifying certain actions to be undertaken by the Respondent to remedy violations found by the Board in an underlying unfair labor practice proceeding.¹ In that proceeding,¹ the Board granted summary judgment in favor of the General Counsel and found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and consider for hire discriminatees Jeff Bloom, Andrew Gasca, and Donald Newton because of their union membership and activities in assisting the Union. The Board also ordered traditional remedies for these violations, including a make-whole provision and a requirement that the discriminatees be "instat[ed] to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions." 333 NLRB at 659.

On January 31, 2002, a compliance specification issued setting forth a total backpay amount of \$82,606.44 owed to the discriminatees in apportioned amounts. However, on April 8, the parties entered into the above

mentioned settlement agreement, resolving the issues set forth in the compliance specification. The agreement, entitled "Stipulation Consenting to Instatement, Amount of Backpay and Schedule for Payment" (Stipulation) provided that instead of the payment of \$82,606.44 specified in the compliance specification, the Respondent would satisfy its backpay obligations by the payment of \$66,100.12. The Stipulation further provided that the Respondent's instatement obligation would be fulfilled by offering the three discriminatees "any position for which they are qualified." In the event that there were no available positions of this kind, the Stipulation required the Respondent to place the discriminatees on a preferential hire list pending the availability of positions. Finally, the Stipulation contained "noncompliance" provisions specifying the remedy to be applied in the event of a "material breach of this Stipulation."

Following a dispute over whether the Respondent had satisfied its obligations under the Stipulation, the General Counsel moved to revoke this settlement agreement. On June 30, 2003, the General Counsel issued an Order revoking settlement agreement and a new compliance specification and notice of hearing. On July 8 and September 22, 2003 the Respondent filed, respectively, an answer and amended answer, denying that it had breached the Stipulation and disputing the amount of backpay the General Counsel claimed in the new specification.²

Judge's Decision

The judge was presented with two separate but related questions in this compliance case—(1) whether the Respondent breached the Stipulation and, if so, (2) whether the remedy for that breach was one specifically set forth in the noncompliance provisions of the Stipulation. The judge answered both questions affirmatively.

On the first question—whether there was a material breach, the judge found that the Respondent breached the Stipulation on two separate occasions—September 12 and December 2, 2002.³ On September 12, the Respondent hired Carlos Hernandez as a bricklayer in its mason division. The judge found that because discriminatees Bloom, Gasca, and Newton were bricklayers (as well as tuck pointers), the Respondent failed to comply with the Stipulation by hiring Hernandez for the bricklayer job rather than offering that position to one of the discriminatees.

² In his new compliance specification, the General Counsel recalculated the backpay owed the discriminatees, applying a different formula and extending the backpay period.

³ All dates hereinafter are in 2002.

¹ 333 NLRB 658 (2001). The Board's decision and order was enforced by the United States Court of Appeals for the Seventh Circuit in Case 01-2796 on October 15, 2001.

On December 2, the Respondent offered the discriminatees positions as roofers. When the discriminatees refused to accept the roofer jobs for the stated reason they were not qualified to perform that work, the Respondent extinguished their instatement and preferential hiring rights.

As to the December 2 offer, the judge noted that the language in the Stipulation obligating the Respondent to offer Bloom, Gasca, and Newton instatement for “any position for which they are qualified,” was ambiguous because “[n]othing in the Stipulation itself defines this phrase.” Based on this ambiguity, the judge found that it was necessary to consider extrinsic evidence as to what the parties meant by this language. That extrinsic evidence, according to the judge, established that the parties intended and understood that the discriminatees were entitled to instatement offers to bricklayer or tuck pointer positions. Because the December 2 offer was not to one of these specified positions, the judge found that the offer did not satisfy the Stipulation’s requirements. Further, the judge found that the December 2 offer was additionally deficient because the discriminatees were not shown to be qualified to perform the offered roofer work.

Having concluded that the Respondent’s September 12 and December 2 conduct constituted a material breach of the Stipulation, the judge then turned to the question of remedy. The judge found that the Stipulation’s noncompliance provisions governed, and that those provisions clearly specified that, in the event of a breach, the Respondent would pay the \$82,606.44 backpay amount specified in the original compliance specification, rather than the \$66,100.12 backpay amount agreed to in the Stipulation. Noting that the Respondent had already paid the \$66,100.12 specified in the Stipulation, the judge ordered it to pay the balance of \$16,506.42 due under the original compliance specification, with interest. Further, because the Respondent had hired Hernandez for a position that the judge found should have been offered to a discriminatee, the judge ordered the Respondent to additionally reimburse discriminatee Bloom for the amount of Hernandez’ earnings for the period that Hernandez worked for the Respondent.

Based on his reading of the Stipulation, the judge also ordered the Respondent to give continuing effect to the instatement and preferential hiring provisions, as modified in two respects. First, based on his determination of the parties’ intent in entering into the Stipulation, the judge ordered the Respondent to offer the discriminatees instatement to the positions of bricklayer or tuck pointer, rather than to “any position for which they are qualified,” as set forth in the Stipulation. Second, citing the long history of the case, and the interest in preventing pro-

longed compliance proceedings, the judge limited the discriminatees’ preferential hire period to 1 year from the date of his recommended order.

Each of the parties excepts to the judge’s recommended Order. The General Counsel excepts insofar as the judge limited the preferential hire period to 1 year and terminated the backpay owed discriminatee Bloom as of the date that Hernandez ceased working for the Respondent. The Union excepts, arguing that the Respondent’s breach of the Stipulation warranted setting it aside, permitting the General Counsel to issue a new specification, and that the judge additionally erred in limiting the preferential hire period to 1 year. The Respondent cross excepts, asserting that there is nothing ambiguous in the Stipulation’s terms and that its December 2 offer satisfied the Stipulation’s requirements. The Respondent further argues that the discriminatees were not entitled to the position for which Hernandez was hired and that discriminatee Gasca’s backpay should be reduced due to interim earnings.

Although we agree with the judge’s finding that the Respondent materially breached the Stipulation, we do so under a different rationale.

Findings and Analysis

First, for the reasons stated by the judge, we agree that the Respondent’s September 12 hiring of Hernandez for a position that the discriminatees clearly were qualified to perform breached the Stipulation. We likewise find that the Respondent’s December 2 “roofer” offer did not satisfy the requirements of the Stipulation. Contrary to the judge, however, we do not find the December 2 offer deficient on the basis that the instatement obligation could be satisfied only by offering the discriminatees jobs as tuck pointers or bricklayers. Rather, as argued by the Respondent in its cross exceptions, such a limitation is contrary to the relevant provision of the Stipulation, which required the Respondent to offer the discriminatees any position “for which they are qualified.” Further, unlike the judge, we find nothing ambiguous in this provision. As the Respondent correctly notes on brief, the Board itself sometimes uses the same terminology in its remedial orders.⁴ Thus, we think it clear that the Respondent was obligated to offer the discriminatees jobs to any position for which they were qualified. The only issue for potential litigation was whether the discriminatees were qualified for a particular job.

Such a dispute arose in this case and the question, whether the discriminatees were qualified for roofer

⁴ See, e.g., *Caruso Electric Corp.*, 332 NLRB 519 (2000) (Amended Remedy); *Laidlaw Waste Systems*, 313 NLRB 680, 682 (1994) (par. 2(b) of order).

work, was fully litigated. When the discriminatees were offered roofing positions on December 2, they told the Respondent's official that they had no roofing experience, and did not consider themselves qualified. The Respondent did not respond to these assertions. We find insufficient evidence that the Respondent clearly and unequivocally offered the discriminatees positions for which they were qualified. Although the Respondent now maintains that the roofing positions offered to the discriminatees were basically unskilled laborer positions for which the discriminatees were qualified, the Respondent did not convey the limited requirements of the job to the discriminatees in response to their refusal to accept the roofing jobs due to a lack of roofing experience. For this reason, we cannot find that the discriminatees were offered positions for which they were qualified. Accordingly, we find that the Respondent breached the Stipulation when it extinguished the discriminatees' preferential hiring rights after they declined the roofing positions because they believed they were not qualified for those positions.⁵

Having found that the Respondent's September 12 and December 2 conduct constituted a material breach of the Stipulation, we next determine whether the provisions of the Stipulation govern the applicable remedies in the case of such a breach. In agreement with the judge, we find that they do.⁶ Thus, we find that the Respondent is obligated to pay the difference between what it has already remitted to the Board and the total backpay figure of \$82,606.44.⁷ As found by the judge, that amount owed is \$16,506.42, plus interest.⁸

⁵ As a technical matter, the offer was not the breach. That is, the Respondent did not promise to refrain from offering jobs for which the discriminatees were not qualified. The breach was the Respondent's taking the position that its offer satisfied its obligations.

⁶ For the reasons stated by the judge, we reject the Union's argument that the Respondent's breach of the Stipulation warranted its nullification and entitled the General Counsel to issue a new compliance specification that differs from the original specification as to the backpay period and formula.

⁷ We reject the Respondent's argument, raised for the first time in its cross-exceptions, that discriminatee Gasca willfully failed to disclose his interim earnings for part of the period for which he was awarded backpay under the Stipulation. First, the Respondent presents no evidence to support its contentions that Gasca concealed his interim earnings or that these earnings were not considered in calculating the backpay due him under the Stipulation. Second, even assuming that Gasca willfully failed to disclose his interim earnings, the Respondent fails to indicate whether this "evidence" is newly discovered or was previously unavailable warranting consideration of it now under Sec. 102.48(d)(1) of the Board's Rules and Regulations. Accordingly, we deny the Respondent's request that Gasca's backpay be recalculated and that any overpayments be reimbursed to the Respondent.

⁸ As noted above, in addition to the payment of \$16,506.42, the judge ordered the Respondent to reimburse discriminatee Bloom for the amount (to be determined at compliance) of Hernandez' earnings for

We also find that the Respondent is obligated to offer the discriminatees reinstatement to "any position for which they are qualified." Thus, because we find that the instatement language of the Stipulation was unambiguous, we shall modify the judge's recommended Order to the extent that it requires the Respondent to offer tuck pointer or bricklayer jobs to the discriminatees. We shall substitute, instead, the clear and unambiguous language of the Stipulation requiring the Respondent to offer the discriminatees "any position for which they are qualified."⁹

the period that Hernandez worked for the Respondent. The General Counsel excepts to the limitation of this remedy, arguing that Bloom's backpay should not be tolled as of the date that Hernandez ceased his employment with the Respondent. We reject the General Counsel's exception in the circumstances of this case.

Reimbursing Bloom or any of the other discriminatees with the earnings of Hernandez was apparently not provided for in the Stipulation. Thus, we would have found that the judge erred by granting any backpay exceeding the specific amounts set forth in the Stipulation had the Respondent argued this point in its exceptions. However, the Respondent does not argue in its exceptions that the judge went beyond his authority when he granted this additional backpay to Bloom, and in its answering brief the Respondent concedes that the "ALJ correctly found that the term of qualified work that should have been offered to a discriminatee was limited to the work of Mr. Hernandez." In the absence of argument by the Respondent that the judge's granting of additional backpay to Bloom was contrary to the terms of the Stipulation, we affirm this remedy. We will not, however, expand that remedy in the manner sought by the General Counsel because to do so would be contrary to the terms of the Stipulation. We note, however, that but for the controlling provisions of the Stipulation regarding the amount of backpay owed in the event of a breach of the agreement, there may have been merit in the General Counsel's contention that it would be inappropriate to cut off Bloom's backpay as of the time Hernandez ceased his employment. Cf. *McGuire Plumbing & Heating*, 341 NLRB No. 29 fn. 1 (2004) (Board does not shorten a discriminatee's backpay period merely because "comparable employees" cease their employment before the end of the discriminatee's backpay period. The "mere fact that other employees stopped working for the Respondent at various times during the backpay periods does not demonstrate that the discriminatees would likewise have stopped working for the Respondent at these same times.")

⁹ The General Counsel asserts in his exceptions that the judge erred by failing to address his "alternate theory" of the Respondent's breach of the Stipulation and that "[w]ithout a specific ruling on this issue, the [judge's] decision is incomplete and the parties still do not ultimately know whether masonry [tuck pointer or bricklayer] positions are the only jobs that can satisfy the requirements of the stipulation." Our modification of the judge's order now makes clear to the parties that offers of any job for which the discriminatees are qualified, will satisfy the Respondent's obligation under the Stipulation. As for the General Counsel's alternate theory of a breach of the Stipulation, we do not find that the judge erred in failing to address it. That theory alleges that, even accepting the Respondent's contention that the roofer job offers on December 2 were sufficient to satisfy its obligations under the Stipulation, the Respondent had been breaching the Stipulation since its April execution by failing to offer the discriminatees roofer jobs that became available between then and December. Because we have rejected the Respondent's contention, it is unnecessary for us, as it was for the judge, to pass on this theory.

We shall also modify the judge's recommended Order with respect to the preferential hiring provisions of the Stipulation that he ordered the Respondent to maintain. The judge ordered that, in the event that there were no openings presently available for the tuck pointer/bricklayer jobs for which he ordered instatement, the Respondent was to maintain the names of the discriminatees on a preferential hire list for those positions, but he imposed a 1-year limitation on the duration of this requirement dating from the issuance of his decision. The General Counsel and Union except to this limitation, and for several reasons we find merit in the exceptions.

First, no party requested a 1-year limitation on the preferential hiring provision, and we perceive no supporting rationale for it. The judge found the limitation warranted because of the "history of this case, and in order to avoid a prolonged period of compliance" However, the history of this case involves the Respondent's violation of the Act in its refusal to hire the discriminatees or consider them for employment, and its subsequent two breaches of an agreement settling the manner in which the violations were to be remedied. Nowhere in this history, or in the potential for a "prolonged period of compliance" do we find the presence of any mitigating circumstances warranting reduction of the Board's traditional remedy.

Second, limiting the preferential hiring period to 1 year is not, as the judge found, consistent with the Stipulation. The Stipulation provided that until compliance was achieved, the Respondent would remain bound by the affirmative instatement and preferential hiring provisions of the Stipulation. No time limitation was placed on these affirmative obligations.

Finally, we agree with the General Counsel and Union that the judge's temporal limit on the preferential hiring obligation improperly rewards the Respondent for its unlawful conduct. By breaching the Stipulation, the judge reduces the time for the Respondent to comply with what was an unlimited time obligation under the Stipulation to maintain a preferential hiring list. We decline to reduce the Respondent's affirmative obligations in this manner and shall modify the judge's recommended Order by deleting reference to the 1-year durational time limitation placed on the preferential hiring provision of the Stipulation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders the Respondent, Windward Roofing and Construction Co., Chicago, Illinois, its officers, agents, successors, and assigns to take the action set forth in the Order as modified.

1. Substitute the following for paragraph c.

"c. Offer Bloom, Gasca, and Newton instatement to any position for which they are qualified."

2. Substitute the following for paragraph d.

"d. If at the time of this Order no positions exist for which Bloom, Gasca, and Newton are qualified place them on a preferential hire list and offer them any position that becomes available for which they are qualified, before offering those positions to anyone else. To ensure compliance with this provision, report to the compliance officer for Region 13, on a quarterly basis, all hires during the preceding quarters."

Dated, Washington, D.C. August 2, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin McCormick, Esq., for the General Counsel.

Kevin J. Kinney, Esq. and Timothy C. Kamin, Esq. (Krukowski & Costello, S.C.), of Milwaukee, Wisconsin, for the Respondent.

Barry M. Bennett, Esq. and Justin J. Lannoye, Esq. (Dowd, Bloch & Bennett), Chicago, of Illinois, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. On March 19, 2001, the Board issued its decision in this case, finding, inter alia, that the Respondent, Windward Roofing and Construction Co., Inc., violated Section 8(a)(3) and (1) of the Act by refusing to hire and consider for hire Jeff Bloom, Andrew Gasca, and Donald Newton because they joined and assisted the Charging Party Union.¹ The Board ordered, as a remedy for these unfair labor practices, that the Respondent offer Bloom, Gasca, and Newton instatement to the positions to which they applied or, if those positions no longer existed, to substantially equivalent positions, and make them whole for any loss of earnings or other benefits suffered as a result of the Respondent's discrimination against them. On October 15, 2001, the Court of Appeals for the Seventh Circuit entered its judgment enforcing the Board's order in full.

On January 31, 2002, the Board's Regional Director issued a compliance specification and notice of hearing to resolve a conflict that had arisen over instatement and the amount of

¹ 333 NLRB 658 (2001).

backpay due under the Board's order. On April 8, 2002, before any hearing had been held, the Acting Regional Director withdrew the specification based on a "Stipulation Consenting to Instatement, Amount of Backpay and Schedule for Payment" executed by the Respondent, the Charging Party and the General Counsel. This stipulation set forth certain actions the Respondent would take to comply with the instatement and backpay provisions of the Board's Order. In December 2002, a dispute arose over the Respondent's compliance with the instatement provisions of the stipulation, leading to issuance of an Order revoking settlement agreement and a new compliance specification and notice of hearing on June 30, 2003. The order and specification alleged that the Respondent had breached the settlement stipulation on two alternate theories, to be discussed, and recalculated the amount of backpay owed under the Board's order under each theory.² On July 8, 2003, the Respondent filed an answer to the order and specification, denying that it had breached the settlement stipulation and disputing the amount of backpay claimed by the General Counsel. On September 22, 2003, the Respondent filed an amended answer setting forth in greater detail its position with respect to the allegations of the specification.³

The pleadings in this case raise, as a preliminary issue, whether the Respondent breached the settlement stipulation in December 2002 when it offered the discriminatees positions in its roofing division and extinguished their instatement rights when they declined those positions, or earlier when it hired an employee named Carlos Hernandez whose position is in dispute. Subsumed within this issue is the question regarding the parties' intent regarding the instatement remedy when they entered into the stipulation to resolve the compliance issues raised by the original specification in 2002. If the Respondent is found to have breached the settlement stipulation, the question of remedy for the breach arises. The Respondent contends that the sole remedy for any breach of the settlement stipulation is spelled out in the stipulation itself. The General Counsel and the Charging Party argue that, as a result of the Respondent's non-compliance with the instatement provisions of the stipulation, the discriminatees are entitled to full backpay retroactive to the initial refusal to hire violation and continuing in futuro until the Respondent makes a valid instatement offer, less the backpay already received pursuant to the settlement stipulation. Also at issue in this case are the appropriateness of the General Counsel's backpay calculations, the reasonableness of the discriminatees' mitigation efforts and whether all interim earnings have been accounted for.

I heard this case on September 24 and 25, 2003 in Chicago, Illinois. On October 30, 2003, the General Counsel, the Respondent, and the Charging Party filed briefs. Having considered the testimony and documentary evidence offered at the

hearing and the arguments advanced by the parties, I make the following

FINDINGS OF FACT

I. THE BOARD'S ORDER AND THE PARTIES' RESOLUTION OF COMPLIANCE ISSUES

The Board's unfair labor practice decision in this case is a summary judgment based on the Respondent's failure to file a timely answer to the original complaint. The decision establishes for purposes of the instant matter that the Respondent discriminatorily failed to hire and consider for hire Bloom, Gasca, and Newton since about March 2000 and that the Respondent had at least 14 positions available for which they were qualified during the period from March 2000 to the date of the decision. The Board's order, enforced by the court, required the Respondent to, inter alia, "offer [Bloom, Gasca, and Newton] immediate instatement to the positions to which they applied, or if those positions no longer exist, to substantially equivalent positions."⁴ The Board further ordered the Respondent to make Bloom, Gasca, and Newton whole "for any loss of earnings and other benefits suffered as a result of the discrimination against them", to be computed under *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because it was a summary judgment, the Board's decision does not provide details regarding the positions Bloom, Gasca, and Newton applied for, or what positions the Respondent had available for which they were qualified at the time of the discrimination. Evidence offered at the instant hearing filled in some of these gaps. It is undisputed that Bloom, Gasca, and Newton applied for tuck pointer positions in March 2000 in response to newspaper advertisements being run by the Respondent. Bloom testified that he was a tuck pointer by trade and had experience in masonry and concrete restoration, brick replacement and lintel replacement and all phases of bricklaying. He had also run jobs as a foreman since 1979. Newton testified that he was a bricklayer by trade with 30 years experience but spent only one season tuck pointing. Newton also worked as a laborer for three years before becoming a bricklayer. Gasca testified that he had 30 years experience as a bricklayer, but had also worked as a concrete refinisher, work he described as basically that of a laborer. All three were full-time paid union organizers at the time they applied for jobs with the Respondent.

The original compliance specification, which issued on January 31, 2002, calculated total backpay for the three discriminatees at \$82,606.44, broken down as follows:

| | |
|--------|-------------|
| Bloom | \$28,382.50 |
| Gasca | \$27,080.12 |
| Newton | \$27,143.82 |

The January 2002 specification alleged that the backpay period began on March 1, 2000, and ended on November 12, 2001,

² On the last day of the hearing, the General Counsel amended the specification to allege a third theory of breach of the stipulation.

³ At the hearing, I denied the General Counsel's motion to strike the amended answer. See *Vibra-Screw, Inc.*, 308 NLRB 151, 152 (1992), and cases cited therein. Accord: *Everman Electric Co.*, 334 NLRB No. 6 (2001) (not reported in Board volumes).

⁴ The Board did not order a separate remedy for the unlawful refusal to consider allegation, finding that the remedy for that violation was subsumed within the broader remedy for the refusal to hire violation. 333 NLRB *supra* at 659 fn. 2.

which was alleged as the last date on which the discriminatees could have accepted an outstanding offer of instatement.⁵ To determine gross backpay, the Region used the hours worked during this backpay period by representative employees multiplied by the median wage rate of employees similarly employed. The attachments to the specification show that the Region included laborers in the group of representative employees used to determine the hours the discriminatees would have worked had the Respondent hired them. The attachments also show that the wage rates of all employees, including laborers, masons, and bricklayers/tuck pointers were used to determine the median rate of pay. Of the three discriminatees, only Newton was reported to have had any interim earnings, i.e., \$1905.14 in the third quarter of 2000.

Rather than litigate the issues raised by the January 2002 specification, the parties entered into the "Stipulation Consenting to Instatement, Amount of Backpay and Schedule for Payment" that was executed by the Respondent on April 3, 2002, the Charging Party on April 5, 2002 and the Region on April 8, 2002. The stipulation provides as follows:

(3) The Respondent and the Regional Director, acting through their respective counsel, reached agreement on instatement and the amount of backpay due and owing under the terms of the aforesaid enforced Decision and Order of the Board. Said agreement has been reduced to writing in this stipulation and based upon it, the obligation of the Respondent to make whole employees under the enforced Board Order will be discharged by payment to the Board, on behalf of the employees, a total of \$66,100.02. Respondent shall fulfill its obligation to instate Gasca, Newton and Bloom by extending offers for any position for which they are qualified.

(4) Respondent shall immediately offer instatement to Gasca, Newton and Bloom. In the event that the positions are not presently available, Respondent shall place Gasca, Newton and Bloom on a preferential hire list and shall extend offers of instatement as positions become available.

(5) The Respondent has requested to be allowed to make monthly payments on the debt owed to the Board. The Board and the Respondent, desiring to facilitate the Respondent's request for monthly payments and to avoid further proceedings and to insure the continuous receipt of payments on the debt until it is fully satisfied, do hereby enter into this Settlement Agreement, and agree as follows:

A. By execution of this Stipulation, the Respondent hereby acknowledges the Board's claim of \$66,100.02 net backpay owing to the discriminatees as follows:

| | |
|---------------|-------------|
| Jeff Bloom | \$22,711.11 |
| Andrew Gasca | \$21,668.97 |
| Donald Newton | \$21,719.94 |

⁵ Bloom testified that he received an offer from Respondent for a masonry position in October 2001 but he did not accept it because the Union's attorney was negotiating a settlement at the time. A copy of the letter, dated October 29, 2001, is in evidence. The parties agree in this proceeding that this offer did not suffice to toll backpay.

B. Beginning on April 20, 2002, the Respondent shall make 6 equal monthly payments of \$11,016.67.

C. Payment of the amounts due the Board pursuant to this stipulation shall be made payable to the National Labor Relations Board and be delivered and received by the Board at the offices of Region 13 [address omitted] by no later than the twentieth day of every month beginning on April 20, 2002 and continuing thereafter until said total settlement amount owed to the Board has been paid in full. The final payment is due on September 20, 2002.

D. Report on a quarterly basis all hires by the Respondent during that calendar quarter beginning with that quarter ending March 31, 2002, and continuing until Respondent has fulfilled its obligation to extend written offers of instatement to Newton Gasca and Bloom (sic).

The amount of backpay agreed to by the parties represented approximately 80 percent of the net backpay sought by the General Counsel in the original specification. There is no dispute that the Respondent complied with its obligation to pay this amount.⁶ There is no evidence, nor any claim, that the Respondent was untimely in making its monthly payments under the agreement. There is also no claim that the Respondent failed to file quarterly reports of hiring before December 2002. The sole contention here is that the Respondent breached the instatement and preferential hiring provisions of the stipulation. The evidence regarding this alleged breach will be discussed in the next section of this decision.

The parties, in their stipulation, also provided for the possibility of a breach of the agreement as follows:

(6) This agreement contemplates strict adherence to any of the terms set forth above, and the Respondent acknowledges that any failure to abide by such terms will constitute a material breach of this stipulation. The Regional Director for Region 13 of the National Labor Relations Board may serve a notice of default on Respondent. The Respondent shall then have 14 days from the date of said notice to cure the default. If the default, including offers of instatement, is not cured within said 14 day time period, the balance of the amount specified in the backpay specification, (\$82,606.44 plus interest in the amount of \$5,952.32) less any payments received shall become immediately due and payable. The Regional Director may, without further notice, institute any and all further proceedings against Respondent for the collection of the full indebtedness remaining due.

(7) In the event of noncompliance and default under paragraphs 4 or 5 above, the Respondent's answer, if any, to the Compliance Specification shall be considered withdrawn and the Regional Director may file a Motion for Summary Judgment. The Board may then, without necessity of trial or any other proceeding, find all allegations in the aforesaid Compliance Specification to be true and may

⁶ The discriminatees did not keep the backpay they received from the Respondent, donating it to the Charging Party to be used for the education of other organizers. Presumably they will do the same with any additional backpay they receive as a result of this proceeding.

enter a Supplemental Order forthwith providing Respondent, its officers, agents, successors, and assigns shall make whole the employees for loss of pay suffered by reason of the discrimination against them, by payment to them the balance of the full backpay amount owing of \$82,606.44 plus interest in the amount of \$5,952.32 less any payments made. The United States court of appeals may, upon application by the Board enter its Judgment enforcing the Supplemental Order of the Board. The Respondent waives all defenses to the entry of the Judgment including compliance with the Supplemental Order of the Board, and its right to receive notice of the filing of an application for the entry of such Judgment, provided that the Judgment is in the words and figures set forth in paragraph 6, above. However, the Respondent shall be required to comply with the affirmative provisions of the Board's Supplemental Order after entry of the Judgment only to the extent that it has not already done so. The Board shall then be entitled to immediately take any action pursuant to the FDCPA, or any other proceedings which the Board may be entitled to and the Respondent shall be deemed to have waived any right to assert any defense to such action.

The FDCPA cited in the stipulation is the Federal Debt Collection Procedure Act, 28 U.S.C. Ch. 176.

II THE RESPONDENT'S ALLEGED NONCOMPLIANCE WITH THE STIPULATION

The Respondent satisfied its obligations to pay the 80 percent of backpay agreed upon by the parties. Because the Respondent had no openings at the time of the stipulation, the discriminatees were placed on a preferential hiring list. On April 26, 2002, the Respondent filed its first quarterly report of new hires. By letter that date, signed by Nancy Rodenski, the Respondent's accounting and human resource manager, the Respondent reported that there were no new hires in the masonry department during the period January 1 through March 31, 2002.⁷ On May 2, Rodenski submitted a payroll printout of all employees employed by the Respondent during the period January 1 through April 30, 2002, listing their gross pay and number of weeks worked during that period. Before each employee's name was a number corresponding to the payroll division the employee was assigned. Rodenski highlighted the employees in division 3 in yellow, advising the Region, in her cover letter, that all mason workers are in division 3. Rodenski also submitted computer printouts showing the date of hire and any raises for each mason division employee. Finally, she reported that two of the 23 mason division employees had not yet been called back to work.

On July 2, 2002, Rodenski submitted the second quarterly report under the terms of the stipulation. She included a similar payroll printout as that previously submitted showing weeks worked and earnings for all employees during the preceding quarter, again highlighting in yellow the names of those em-

ployees in the masonry division. She reported that one employee had been recalled to the masonry department but that there were no new hires during the quarter. On September 30, Rodenski filed the Respondent's next quarterly report, including the payroll printout for the period June 1 through September 30, 2002, with the names of the employees in the mason division again highlighted in yellow. Rodenski advised the Region that one employee whose name appeared for the first time in the mason division, Carlos Hernandez, was a division 1 (flat roofing) employee who had been loaned to the mason division for a three-day job for which the Respondent did not want to hire a new employee. Rodenski also advised the Region that the Respondent was "waiting for the go ahead for two jobs and d[id] not have a start date yet. As soon as we do, Mr. Bloom, Mr. Gasca and Mr. Newton will be notified."

On September 12, 2002, the Respondent sent letters to Bloom, Gasca, and Newton informing them that positions had opened in the mason department and directing them to report to the Respondent's office during business hours before September 19, 2002, if they were interested in applying for one of these openings. There is no dispute that all three discriminatees appeared at the Respondent's office within the time allowed and submitted applications. On these applications, each indicated that they were seeking a tuck pointer position and were willing to accept whatever salary was offered.⁸ None was hired at that time. No explanation for this was offered by the Respondent at the hearing.

On November 25, 2002, the Respondent again contacted Bloom, Gasca, and Newton by letter, notifying them that the Respondent had a position available for each of them and directing them to report to the office at 8 a.m. on Monday December 2, 2002, for orientation. The Respondent did not identify in this letter the position it had available, the rate of pay, hours, job location or any other specifics of its job offer to the discriminatees. On December 2, 2002, Bloom, Gasca, and Newton reported to the Respondent's office at the appointed time and met with a woman in a conference room. The woman did not introduce herself, but the Respondent identified her at the hearing as Rodenski.⁹ Bloom, Gasca, and Newton each testified about this meeting. Their testimony was essentially corroborative, with only inconsequential deviations. Because no witness was called to contradict them, I shall credit their versions of what transpired.

According to the General Counsel's witnesses, the woman identified as Rodenski handed Bloom, Gasca, and Newton a packet of materials, which they took with them when they left. The packet, which was placed in evidence, included payroll and personnel forms for new hires, work rules, and benefit information. Rodenski reviewed the work rules and told the discrimina-

⁸ On his application, Newton expressed interest in a bricklayer or tuck pointer position.

⁹ Rodenski, who no longer worked for the Respondent at the time of the hearing, was not called as a witness. The Respondent's counsel represented that she was on vacation in Alaska at the time of the hearing.

⁷ The masonry department employs bricklayers and tuck pointers. The Respondent also has separate departments or divisions, under its payroll system, for flat roofing, single/slope roofing, sheet metal, service, warehouse employees and a mechanic.

tees that the position available was in the flat roofing division.¹⁰ When asked what the rate of pay would be, Rodenski replied that the Respondent paid its employees based on merit and their pay would be based on productivity. Newton said he had never worked as a roofer and asked if there would be any training for these jobs, emphasizing his safety concerns. Rodenski replied that whatever training was needed would be provided by the foreman. Newton excused himself from the meeting and returned after a short time. When he returned, he told Rodenski that he had applied for a job as a mason or tuck pointer and that he had no experience in roofing. He expressed safety concerns about working such a job without proper training. Newton told Rodenski that he would wait for a masonry job and then left the room. Gasca and Bloom left shortly thereafter. Before they left, Rodenski told them that the Respondent had no openings in the masonry department but would call them if an opening came up.

On the same date that Bloom, Gasca, and Newton declined the roofing jobs offered by the Respondent, John Schultz, Operations, sent a letter on behalf of the Respondent to each of the discriminatees, with a copy to the Board's regional office, confirming that they had declined offers of employment and wishing them the best in their future endeavors. There is no dispute that the Respondent, since December 2, 2002, has not offered any other positions to the discriminatees, has extinguished their preferential hiring rights, and has not submitted any further quarterly reports of hiring to the Region. The General Counsel alleges that the Respondent's actions on and after December 2, 2002 breached the settlement stipulation. The Respondent contends that its offers of positions in the flat roofing division satisfied its obligation under the stipulation to offer the discriminatees instatement to "any position for which they are qualified."

The Respondent's Chief Financial Officer John Cherachi testified for the Respondent regarding these job offers. According to Cherachi, the Respondent had two big jobs lined up for December, one in the loop area of downtown Chicago and another in suburban Elk Grove Village. Both jobs were described as "re-roofing" jobs, i.e. tearing off an old roof before installing new roofing material. Cherachi testified that the Respondent needed a number of employees to tear off the old roof, drop the material down the chute into a dumpster, and bring new material up to the roof, essentially unskilled laborers work. According to Cherachi, the only requirement to be hired for these jobs was "two hands, two legs." Cherachi did not testify regarding the rate of pay, work hours or other employment conditions of these positions.

The Respondent also attempted to show that, in making these offers to the discriminatees, the Respondent was relying upon advice from the Board's regional office. The Respondent's efforts to prove this were stymied by rulings from the General Counsel and the Board prohibiting the Region's Compliance Officer from testifying about conversations with the Respondent on this matter. At the hearing, the Respondent did offer

testimony from Cherachi regarding a meeting he attended in April 2003, after the issue of the Respondent's compliance with the stipulation had been raised, during which he heard Rodenski ask the compliance officer to confirm a telephone conversation she had with him in October 2002. According to Cherachi, Rodenski asked the compliance officer if he recalled telling her to offer the discriminatees "anything" to get them off the list because the case had gone on to long. Cherachi testified that the compliance officer agreed with Rodenski's recollection of the conversation.¹¹ I received this testimony over strenuous objections from the General Counsel and the Charging Party, reserving judgment on its ultimate admissibility and weight until I made this decision. My conclusions will be discussed infra.

As previously noted, the General Counsel amended the specification at the hearing to allege, as an alternate theory, that the Respondent breached the settlement stipulation on September 12, 2002, when it hired Carlos Hernandez, the individual identified by Rodenski in her September 30, 2002 quarterly report as a roofer who was "loaned" to the mason division for three days. Evidence offered at the hearing indicates that this representation by the Respondent was not correct. Documents from Hernandez' personnel file establish that he was hired on September 12, 2002. His undated employment application shows that he was seeking a bricklayer position and had previously worked as a bricklayer and heavy machine operator. On a health insurance eligibility form he signed as part of his orientation on September 12, Hernandez is identified as a bricklayer in the mason division. The payroll printout for the period June 1 through September 30, 2002, submitted as part of the Respondent's quarterly hiring report for September 30, 2002, shows he received more earnings for work in the mason division than in the flat roofing division, i.e. \$306 vs. \$90. Curiously, the report does not show how many weeks he worked in each department during the period covered by the report. Because he was not hired until September 12, it must be inferred that all of the reported earnings were received in the last 18 days of the month. Hernandez' personnel file also contained an employee warning notice issued to Hernandez on October 31, 2002 by Clarence Dale, who was identified as having worked in a supervisory position in the Respondent's mason division around this time period. The warning identifies Hernandez as a member of the masonry department. Hernandez is also identified as an employee in Division 3 on a January 20, 2003 "Payroll Employee Detail Report", prepared in connection with issuance of his W-2 tax statement. The W-2 issued to Hernandez shows that he earned \$5,839.50 working for the Respondent in calendar year 2002. The January 20, 2003 report also showed that he had year-to-date 2003 earnings of \$1,428.00 and that his rate of pay was \$12/hour. Finally, the Respondent included Hernandez in the December 2, 2002 *Excelsior* list it prepared in response to the Charging Party's petition for an election among the Respondent's masonry employees.¹²

¹¹ As previously noted, the Respondent did not seek to call Rodenski as a witness.

¹² The parties stipulated at the hearing that the petition was filed on November 14, 2002, that the election was scheduled for December 26, 2002 and that the voting unit included all full-time and regular part-

¹⁰ Bloom and Gasca recalled the position as "hot tar" roofing. It appears that this was their understanding of flat roofing. The Respondent does not have any positions identified as "hot tar roofing."

In response to the General Counsel's amendment, the Respondent requested additional time to respond, claiming that it was not prepared to offer evidence that would substantiate the claim in Rodenski's letter that Hernandez was employed in the roofing division and had only been loaned to the mason division for three days. I granted the Respondent's request. By letter dated October 15, 2003, the Respondent's counsel advised the General Counsel that the Respondent had been unable to locate Hernandez, who was no longer employed, and that the Respondent had decided not to supplement the record with any additional evidence. The General Counsel forwarded the Respondent's letter to me and I shall make this correspondence part of the record as ALJ Exhibit 1. Before the hearing adjourned, Cherachi testified briefly regarding Hernandez. Cherachi explained the appearance of Hernandez' name under two departments on the September quarterly report as being due to the fact that he worked in both departments. According to Cherachi, the Respondent had a practice of shifting employees among departments based on workload and to avoid the cost of unemployment resulting from laying off employees. He described as an example the practice of assigning employees to the service department in the winter months to shovel snow, clear snow off roofs, or do minor repairs. Under these circumstances, the employee's division and position would not change, but his earnings would be charged to a different division, depending on where he worked.

Cherachi also testified regarding the Respondent's system for tracking costs by job. As part of this process, the Respondent in fact keeps track of which department each employee is working under by the hour. According to Cherachi, by checking the job reports, one would be able to determine whether Hernandez was working in the flat roofing, shingle roofing, mason or some other division on any given day. Although given time after the hearing to produce such records that might establish whether Hernandez was employed in the roofing or mason division after September 30, 2002, the Respondent failed to produce any additional evidence. I shall draw an adverse inference from the failure to offer such evidence in the Respondent's possession, which one would expect would have been offered if it in fact supported the Respondent's position at the hearing. See *Auto Workers*, NLRB, 459 F.2d 1329 (D.C. Cir. 1972); *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

There is no evidence in the record that the Respondent hired any other bricklayers or tuck pointers for its mason division after execution of the settlement stipulation. The last person hired into such a position, before Hernandez, was Romualdo Romero, hired on July 20, 2001.¹³ The parties stipulated at the hearing as to the identity and dates of hire of 19 laborers or roofers who were hired into the Respondent's other divisions between April 17 and December 2, 2002.

time bricklayers, tuck pointers and masonry workers and did not include any roofing division employees. It was also stipulated that the Union withdrew the petition before the election.

¹³ The Respondent did hire two "mason laborers" into the mason division in August 2001, but these two individuals (Muzashvili and Syakalvk) did not return to work in 2002.

As noted above, the General Counsel takes the position that the Respondent has failed to comply with the terms of the settlement stipulation in three ways. The first theory is that the Respondent's offer to the discriminatees of laborer positions in the flat roofing division did not satisfy the instatement provisions of the settlement or the Board's order. The General Counsel contends that the discriminatees' rejection of these offers did not give the Respondent the right to extinguish their instatement rights, abandon the preferential hiring list and cease reporting its hiring activity on a quarterly basis. Under the alternate theory, according to the General Counsel, if it were found that the flat roofing jobs were sufficient to satisfy the Respondent's obligations under the stipulation, then the Respondent had not been in compliance virtually from the time it executed the stipulation because the records show that the Respondent hired others for such positions between April and December 2002. Finally, as noted above, if Hernandez was in fact hired as a bricklayer, tuck pointer or mason before any offers were extended to Bloom, Gasca, and Newton, then the Respondent violated the stipulation and Order when Hernandez was hired. The Charging Party, while essentially in agreement with the General Counsel, takes the position that there is no need to look beyond the hiring of Hernandez to find a breach of the agreement.

The Respondent argues that it satisfied its obligations under the stipulation by offering the discriminatees positions in its flat roofing division because the stipulation only required it to offer them positions for which they were qualified. Because the positions were unskilled jobs, the discriminatees were "qualified" to perform them. The Respondent argues further that its hiring of other employees as laborers or roofers before making offers to the discriminatees did not violate the stipulation because the General Counsel did not establish that the discriminatees were "qualified" to perform the jobs offered to these other individuals. The Respondent argues, similarly, that the hiring of Hernandez has not been shown to be a violation of the stipulation because the General Counsel offered no evidence to show that the discriminatees were "qualified" to perform the job for which he was hired. Under the Respondent's view of the case, the discriminatees' rejection of the December 2, 2002 job offers extinguished any further obligation on the part of the Respondent to comply with the Board's order.

The threshold issue in this case is not whether the Respondent has complied with the instatement provisions of the Board's order. Because the parties entered into an agreement regarding the steps the Respondent had to take to comply with those provisions, the question appropriately is whether the Respondent complied with the agreement of the parties. It is thus necessary to examine the stipulation to determine what the parties intended when they stipulated that "the Respondent shall fulfill its obligations to instate Gasca, Newton and Bloom by extending offers for *any position for which they are qualified*" (emphasis added). Under the parol evidence rule, a trier of fact is confined to the four corners of the document in determining the intent of the parties unless the agreement is ambiguous. In the case of an ambiguity, outside evidence may be considered if it sheds light on the parties' intent at the time the agreement was executed. See *CJC Holdings, Inc.*, 315 NLRB

813 fn. 1 (1994); *Kal Kan Foods, Inc.*, 288 NLRB 590, 592–593 (1988). The phrase “for which they are qualified” is ambiguous. Nothing in the stipulation itself defines this phrase. However, other evidence, which is undisputed, does give meaning to the phrase.

At the time the parties executed the stipulation, the Respondent was required by the Board’s order to offer Bloom, Gasca, and Newton instatement to the positions for which they applied, i.e., tuck pointer, or a “substantially equivalent position”, a term of art in Board litigation which carries meaning based on judicial precedent. Paragraph 4 of the stipulation required the Respondent to “immediately offer” the discriminatees instatement, or to place them on a preferential hire list if positions were not presently available. The fact that the Respondent placed the discriminatees on a preferential hire list after the stipulation was executed establishes that positions “for which they were qualified” did not exist for them at the time, at least as far as the parties understood their agreement. Thereafter, the Respondent hired a number of employees to fill positions as roofers and laborers in the roofing divisions without extending any offers to Bloom, Gasca, or Newton. This is strong evidence that the Respondent understood that positions in the roofing division for which these employees were hired were not the types of positions the parties had in mind when they executed the agreement. Even stronger evidence regarding the intent of the parties can be found in the quarterly hiring reports filed by the Respondent pursuant to the stipulation. The Respondent’s representative, Rodenski, highlighted only the mason division in these reports and reported only regarding whether any new employees had been hired in that division. Moreover, in the last report she filed, Rodenski made an effort to explain away the appearance of Hernandez’ name for the first time under the mason division payroll. All of Rodenski’s statements in these reports, essentially admissions by the Respondent, establish that the Respondent clearly understood that it was obligated by the stipulation to offer the discriminatees a position in the mason division. To find otherwise would mean that the Respondent entered into the stipulation with no intent of complying because, within a short time, it began hiring roofing division employees and continued hiring such employees without any offers being extended to the discriminatees. I shall not ascribe such a degree of bad faith to the Respondent.¹⁴

I find, based on the above, that the parties intended by their stipulation that the Respondent would satisfy its instatement obligations by offering the discriminatees jobs as tuck pointers, or bricklayers, in its mason division. The positions offered to the discriminatees on December 2, 2002, in the flat roofing division, as described by Cherachi, were not sufficient to satisfy the Respondent’s obligations under the stipulation. The fact that no particular skills or experience were required to be hired for

these jobs does not mean that the discriminatees were “qualified” to perform them within the meaning of the stipulation.¹⁵ By the Respondent’s own actions in carrying out its obligations under the stipulation between April and December 2002, it is clear that the positions for which the parties agreed that the discriminatees were qualified were positions in the mason division. Because the offers did not satisfy the terms of the stipulation, the discriminatees’ rejection of them did not extinguish the Respondent’s obligations.

I find, further, that the Respondent failed to comply with the terms of the stipulation on September 12, 2002, when it hired Hernandez without offering this position to any of the discriminatees. The few business records in evidence show that Hernandez was identified as a bricklayer when he was hired and identified on the Respondent’s payroll and other records as being assigned to the mason division. The only evidence to contradict this is Rodenski’s statement in her cover letter with the September 30, 2002 report, to the Region that Hernandez was a roofing division employee on loan to the mason division for three days. This statement is hearsay. Even Cherachi’s testimony that he verified the accuracy of Rodenski’s statement is hearsay because the Respondent never produced the records that Cherachi purportedly used to verify the statement’s accuracy. Cherachi identified the types of records that exist that would have established conclusively whether Hernandez worked as a mason or a roofer, yet the Respondent never produced these records even though it was given time to do so after the hearing closed. Moreover, the Respondent could have called Rodenski, or one of its supervisors, or the person who hired Hernandez, to explain the conflict between the records showing he was an employee in the mason division and the claim that he really was a roofer. Although given the opportunity to request reopening of the record to hear such testimony, the Respondent chose not to pursue this matter. Having drawn an adverse inference from the Respondent’s failure to produce any evidence to show that Hernandez was not hired as a bricklayer in the mason division, I must find that the Respondent’s failure to offer this position to any of the discriminatees was a breach of the stipulation.¹⁶

In reaching my conclusion regarding the alleged breach of the settlement stipulation, I have considered the evidence offered by the Respondent in support of its defense that the December 2002 offers to the discriminatees were based on conversations between the Respondent’s representatives and the Region’s compliance officer. Even assuming a conversation took place as described by Cherachi in April 2003, this would not excuse any noncompliance with the agreement in December

¹⁴ I do not agree with the Respondent that the General Counsel had the burden of proving that the discriminatees were “qualified” for the 19 laborer and roofer positions filled between April and December 2002. The General Counsel having shown that the Respondent previously hired employees to fill positions which, on their face, appear to be the same as those offered to the discriminatees in November 2002, it was incumbent on the Respondent to explain why the positions filled earlier were not what they appeared to be.

¹⁵ It is not even clear from the evidence in the record that the positions described by Cherachi were the same positions offered to Bloom, Gasca, and Newton when they met with Rodenski on December 2, 2002.

¹⁶ Because I have found that the positions offered to the discriminatees on December 2, 2002, did not satisfy the terms of the settlement stipulation, it follows that the Respondent’s hiring of other individuals as laborers in the roofing divisions did not breach the terms of the parties’ agreement.

2002.¹⁷ It is well-established that a respondent proceeds at its own risk if it relies upon statements made by Board agents in taking action that contravenes the terms of a Board order, or the Act itself. See *Neely's Car Clinic*, 255 NLRB 1420 fn. 1 (1981). Accord: *Associated Grocers*, 295 NLRB 806, 814 (1989). See also *Capitol Temptrol Corp.*, 243 NLRB 575, 589, fn. 59 (1979), for a discussion of the pitfalls of relying upon advice from the Board's functionaries. In any event, the Respondent's hiring of Hernandez without offering this position to any of the discriminatees was not based on any advice or representation from the compliance officer or any other employee in the regional office. The Respondent acted on its own in failing to live up to the terms of the agreement at that time.

III. THE APPROPRIATE REMEDY FOR THE RESPONDENT'S NONCOMPLIANCE WITH THE STIPULATION

Having found that the Respondent failed to comply with the instatement provisions of the parties' settlement stipulation, I must determine how to remedy this breach. The General Counsel and the Charging Party argue that the Respondent's non-compliance essentially rendered the stipulation null and void, permitting the General Counsel to go back to square one and recalculate back pay under a different formula than the one utilized in the original backpay specification and to carry it forward to the present and beyond. Under this approach, the discriminatees would be entitled to an additional \$120,175.77, in total, even after offsetting the moneys they received pursuant to the stipulation. As expected, the Respondent strenuously opposes this claim, arguing that under the terms of the stipulation the most it is required to pay for any breach is the remainder of the backpay as calculated at the time of the agreement, i.e. \$16,506.42, plus interest.

In several recent cases, the Board has been confronted with the issue of remedy where a respondent fails to comply with all the terms of a settlement agreement. See *Tuv Taam Corp.*, 340 NLRB No. 86 (2003); *Tom Cat Development Corp.*, 340 NLRB No. 27 (2003); *Bartlett Heating & Air Conditioning*, 339 NLRB No. 131 (2003); *L.J. Logistics, Inc.*, 339 NLRB No. 84 (2003); *Henry's Refrigeration, Heating & Air*, 339 NLRB No. 83 (2003). All but one of these cases involved settlements of unfair labor practice allegations before a hearing on the merits. *Tom Cat Development Corp.*, supra, involved the breach of a compliance agreement similar to that at issue here. In all of these cases, the Board looked to the language of the parties' agreement to determine what remedy to order for the breach. For example, in *Tuv Taam Corp.*, the Board ordered the traditional remedies for the unfair labor practices alleged because the settlement agreement did not contain a liquidated damages provision and because the Regional Director, acting pursuant to the agreement, had revoked the agreement and re-issued the original complaint. In contrast, the Board declined to order any remedy other than the liquidated damages provided in the agreement where the agreement did not specify any additional

remedies. See *Bartlett Heating & Air Conditioning*, supra and *Henry's Refrigeration, Heating & Air*, supra. Finally, in *L.J. Logistics, Inc.*, supra, the Board ordered its traditional remedies because the agreement expressly stated that such would be the result in the event of non-compliance.

The stipulation executed by the parties in this case contains remedial provisions similar to those found in several of the above cases. In paragraph 3 of the stipulation, the parties agreed that the Respondent's obligation to make the discriminatees whole under the Board's order would be discharged by the payment of \$66,100.02 to the Board. Paragraph 6 provided that the Respondent's failure to abide by any of the terms of the stipulation would constitute a material breach, entitling the Regional Director, on behalf of the General Counsel, to serve a 14-day notice of default on the Respondent. If the default, including any failure to offer instatement, were not cured within the 14-day notice period, the parties agreed that the balance of the net backpay specified in the original compliance specification, less any payments already made, would become immediately due and payable and that the Regional Director could institute further proceedings to collect this debt. Paragraph 7 further provided that the Respondent's answer to the original compliance specification would be considered withdrawn in the event of noncompliance and default of the instatement provisions in paragraph 4. The Regional Director would then be authorized to seek summary judgment from the Board, with enforcement by the court of appeals, on the original specification. This would essentially achieve the same result as paragraph 6, i.e., a judgment for the entire amount of backpay as calculated to that point in time, less any payments already received. The General Counsel did not take any of these actions in response to the Respondent's non-compliance with the stipulation.

Nowhere in the stipulation is there any language or suggestion that the Regional Director would, in the event of a breach, revoke the stipulation and issue a new compliance specification that re-calculated backpay for the period covered by the stipulation, which is what the General Counsel did here. Nor is there any language in the stipulation that would indicate that the Regional Director intended to seek additional backpay, beyond the total backpay set forth in the original specification, in the event of a breach of the instatement provisions. On the contrary, the plain language of the stipulation provides that the Respondent would "discharge" its obligation to make the discriminatees whole if it paid them the figure agreed upon in the stipulation, which the Respondent in fact did. The General Counsel and the Charging Party argue that the General Counsel retained the authority to proceed as it has in this case by virtue of use of permissive language, i.e. "may", in the provision calling for issuance of a notice of default and motion for summary judgment on the original compliance specification. I disagree. As a majority of the Board stated, in *Bartlett Heating & Air Conditioning*, supra:

In the absence of clear and unambiguous language in the settlement agreement that, in the event of their noncompliance, the Respondents undertook any obligation other than the payment of the prescribed amount of backpay, we do not find

¹⁷ Cherachi's testimony regarding Rodenski's questioning of the compliance officer and his response is hearsay, which is uncorroborated. Moreover, this conversation occurred in the context of a meeting after the offers were made and would be a weak basis for excusing the Respondent's earlier conduct.

it appropriate to provide for any remedies beyond the payment of \$22,000, less any amounts already remitted.

339 NLRB *supra*, slip op. at 3. I find that the only discretion left to the Regional Director by use of the permissive language in paragraphs 6 and 7 of the stipulation was whether to utilize the notice of default, a summary judgment proceeding, or some other debt collection action to recover the remaining backpay due under the original specification.

Giving effect to the agreement of the parties, I shall recommend that the Respondent be ordered to pay to the Board, on behalf of the discriminatees, the balance due under the original specification, i.e. \$16,506.42, to be apportioned as follows:

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|---------------|------------|
| Jeff Bloom | \$5,671.39 |
| Andrew Gasca | \$5,411.15 |
| Donald Newton | \$5,423.88 |

I shall also recommend that the Respondent pay interest on these amounts, as prescribed in *New Horizons for the Retarded*, *supra*, to the date the payment is made, to ensure that the discriminatees receive the full value of backpay owed under the stipulation. Because the Respondent has already discharged its obligation to make the discriminatees whole under the Board Order by its earlier compliance with the backpay provisions of the stipulation, it would be punitive to require any additional backpay for the period covered by the stipulation.

Because the Respondent has not yet complied with the instatement provisions of the stipulation and the Board's Order, I shall recommend that the Respondent be ordered to offer the discriminatees, to the extent they have not found other substantially equivalent employment, instatement to the positions for which they applied, i.e. tuck pointer, or if those positions are not presently available, to any other substantially equivalent position within the Respondent's mason division. I shall also recommend, if instatement is not presently available, that the Respondent reinstate the preferential hiring list and offer the discriminatees the next available bricklayer, tuck pointer or mason position. In light of the history of this case, and in order to avoid a prolonged period of compliance, I shall recommend that the Respondent's obligation to maintain the preferential hire list will expire at the end of one year from the date of this order. This remedy is consistent with the language of the parties' stipulation, at paragraph 7, indicating that the Respondent shall remain obligated to comply with any affirmative provisions of the Board's order, even after summary judgment proceedings, to the extent it has not already complied.

Finally, because the Respondent's failure to comply with its instatement obligations involved the hiring of Hernandez without offering the position to one of the discriminatees, I shall recommend that the Respondent be ordered to make one of the discriminatees whole for the earnings he would have received had he been hired instead of Hernandez. The evidence in the record shows that Hernandez earned \$396 in the third quarter of 2002 and \$5443.50 in the fourth quarter of 2002.¹⁸ The evi-

¹⁸ These figures come from Hernandez' 2002 W-2 and the "Check Status Report" for the period 6/01/02 to 9/30/02 that was submitted to the Region as part of the Respondent's hiring report for the third quarter of 2002.

dence shows further that Hernandez had earned \$1428.00 in the first quarter of 2003, through January 20. Although it is undisputed that Hernandez was no longer employed by the Respondent at the time of the hearing, the record is silent regarding his termination date or whether he had any additional earnings after January 20, 2003. I shall recommend that this case be remanded to the Region, after issuance of a final order, so that the Region can calculate the gross backpay due for the period since September 12, 2002 based on Hernandez' earnings. No other backpay has accrued since execution of the settlement stipulation because it is undisputed that no other bricklayers, tuck pointers or masons have been hired by the Respondent.

Because there were three discriminatees entitled to instatement under the terms of the parties' stipulation and only one position that became available thereafter, a determination must be made regarding which of the discriminatees should have been offered the position for which Hernandez was hired. Evidence in the record regarding the discriminatees' mitigation efforts makes resolution of this issue easy. There is no dispute that Gasca has been employed since February 2001 as a field representative for the Masonry Institute, which administers the health and welfare and pension plans under the Union's collective-bargaining agreements. Gasca testified that this was a full-time job and that he worked Monday through Friday from 7 a.m. to 3:30 p.m.. Gasca also testified that his annual salary, which includes a car allowance, has been approximately \$80,000 through 2002 and 2003. While, under current Board law, Gasca's previous position as a paid union organizer might not have counted as interim earnings,¹⁹ his current position clearly does. Gasca's full-time work schedule and hours of work would conflict with any position offered by the Respondent. Gasca did not claim that he could perform his duties as a field representative at night or on the weekends. Moreover, his earnings, even without the car allowance, exceeds what he would have earned with the Respondent. Accordingly, because Gasca's interim earnings during the period since September 12, 2002 exceed the gross backpay based on Hernandez' earnings, he would not be entitled to any additional backpay for this period.

The testimony of Donald Newton regarding his efforts at mitigation falls short of what is a reasonably diligent search for work. See, generally, *Tubari, Ltd. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992). According to Newton, the last time he applied for a masonry job prior to the hearing was August 2003, about a month before the hearing.²⁰ However, that was the first job he had sought since January 2003. He testified to no other efforts to find work during the period after Hernandez was hired. Moreover, the parties stipulated that none of the three discriminatees ever applied for jobs with unionized masonry contractors other than one brief period of employment by Newton in Sep-

¹⁹ See, e.g., *Ferguson Electric Co.*, 330 NLRB 514, 517 (2000).

²⁰ The Board's default judgment in *American Alpha Construction, Inc.*, 340 NLRB No. 48 (2003), establishes that Newton in fact applied for this job on March 10, 2003, more than six months before the hearing in this case. Newton did not identify any other jobs he sought since applying for work with *American Alpha*.

tember 2001.²¹ I find that a search for interim employment limited to efforts to “salt” two non-union contractors in a one-year period does not satisfy a discriminatees’ obligation to mitigate damages. Because Newton did not make a reasonably diligent search for work during the period since the Respondent hired Hernandez, he would also not be entitled to any further backpay.

Bloom testified, vaguely, that he has applied for other jobs during the period since the Respondent first discriminatorily refused to hire him. Based on the stipulation of the parties at the hearing, none of Bloom’s efforts to find interim employment involved applying for work with union contractors. Although Bloom did not provide any specifics regarding the number or identity of employers where he sought work, the Respondent did not ask him to provide such details.²² Because it is the Respondent’s burden to prove lack of diligence, I cannot find based on the limited evidence in the record regarding Bloom’s efforts that he failed to meet his obligation to mitigate damages. I shall thus recommend that any backpay owing as a result of the Respondent’s hiring of Hernandez be paid to Bloom.²³

²¹ Newton’s only reported interim employment is within the period covered by the parties’ April 2002 settlement stipulation.

²² In contrast, the Respondent did question Newton regarding these specifics and it is Newton’s answers to the questions which establishes the lack of diligence on his part.

²³ Because Bloom will probably donate any backpay he receives to the Union, it really makes no difference which of the discriminatees receives backpay under this decision.

ORDER

The Respondent, Windward Roofing and Construction Co., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

a. Make whole the following individuals by paying the amounts set forth opposite their names, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings:

| | |
|---------------|------------|
| Jeffrey Bloom | \$5,671.39 |
| Andrew Gasca | \$5,411.15 |
| Donald Newton | \$5,423.88 |

b. Make whole Jeffrey Bloom by paying him an amount, to be determined by the compliance officer of Region 13, equal to the earnings received by Carlos Hernandez since he was hired on September 12, 2002, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings.

c. Offer Bloom, Gasca, and Newton reinstatement to positions as a bricklayer, tuck pointer or mason, or if such jobs no longer exist, to substantially equivalent positions.

d. If no positions exist at the time of this Order, place Bloom, Gasca, and Newton on a preferential hire list for a period of one year from the date of this Order and offer them any bricklayer, tuck pointer or mason positions that become available before hiring anyone else. To ensure compliance with this provision, report to the compliance officer for Region 13, on a quarterly basis, all hires during the preceding quarter.

Dated, Washington, D.C. February 5, 2004